CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2714

Heard in Montreal, Wednesday, 13 March 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. W.E. Davison.

EX PARTE STATEMENT OF ISSUE

On June 15, 1995, the grievor was dismissed from Company service for failing to be available for duty due to his incarceration following his criminal conviction for sexual assault.

The Union contends that the dismissal of the grievor was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority.

The Company denies the Union's contention and declines the Union's request by arguing that the grievor was

There appeared on behalf of the Company:

D. E. Guerin	– Labour Relations Officer, Montreal
G. D. Wilson	– Counsel, Montreal
D. T. Cooke	– Manager, Labour Relations, Montreal
R. M. Andrews	– Labour Relations Officer, Vancouver
S. Moutinho	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. W. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa

unavailable for duty, without permission and, therefore, was properly dismissed.

FOR THE COMPANY:

(SGD.) R. M. ANDREWS

FOR: DISTRICT MANAGER, ENGINEERING SERVICES, CPRS

The grievor, Mr. W.E. Davison, a track maintenance foreman at Regina, was charged on September 5, 1994 with a number of offences under the **Criminal Code**, including the following: sexual touching, incest, sexual assault, disobeying a Court order, use of firearms in committing an offence, and use of force. As he was immediately taken into custody, and originally denied bail, the grievor was unable to attend at work between September 5 and November 4, 1994, when he was temporarily released. For the period between September 6 and September 18 he used his remaining annual vacation to cover the period of his incarceration. The balance of the period was treated by the employer as unauthorized leave. It is common ground that upon his release pending trial, following the results of two disciplinary investigations held on October 12 and November 7, 1994, Mr. Davison was assessed twenty demerits for his unauthorized absence from work. That discipline has not been grieved.

The grievor's trial on the criminal charges came on for hearing on March 27, 1995 and concluded on March 30, 1995, resulting in a finding of guilty against the grievor on the charge of sexual assault. He was immediately sentenced to eighteen months in jail, a sentence which was apparently reduced thereafter to twelve months. Because the Court ordered a publication ban, the details of the grievor's criminal offence and the reasons for sentence are not public.

It is common ground that Mr. Davison did not process a written request for a leave of absence when he was finally sentenced, following his conviction on March 30, 1995. The Company did, however, conduct a disciplinary investigation, at the Regina Correctional Institute, on May 24, 1995, with respect to his absence from work without leave from March 27, 1995. As a result of that investigation Mr. Davison was notified, on June 15, 1995 that he was dismissed from the Company's service for "... failing to be available for duty due to your incarceration following your criminal conviction for sexual assault,".

This Office has long recognized that incarceration for a criminal offence is, of itself, not necessarily grounds for the termination of an employee's service, where there are substantial mitigating factors of significance. In **CROA 1934** the general principles to be applied were described as follows:

> The issue in the instant case is whether the Company was entitled to discipline Mr. Miller because of his unavailability for work during his incarceration. I am satisfied that it was. The issue then becomes whether, in light of all the factors to be considered, a measure of discipline short of

> discharge is appropriate. In assessing that question a number of factors must be weighed. Among them are the impact, if any, on the employer's operations and interests arising out of the grievor's criminal conviction, as well as the grievor's length and quality of service. The principles that apply were expressed in the following terms in *CROA 1645*, which also involved the discharge of an employee convicted and incarcerated in relation to a fatality:
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> > As is implicit from the cases, there can be no automatic presumption that conviction for a serious criminal offense, including subsequent incarceration, are necessarily inimicable to the continuation of an employment relationship. In this, as in any matter of discipline, each case must be assessed on its own merits, with close regard to a number of factors, including the nature and circumstances of the offense, efforts at rehabilitation, the nature of the work performed by the employee, the length of an employee's service and the quality of his or her disciplinary record and prior criminal record, if any. Obviously, careful consideration must be given to the reinstatement of any employee who is absent without leave due to incarceration for a serious criminal offense, having particular regard to the need of the Company to provide, and appear to provide, a public service consistent with the highest standards of safety and integrity in its employees. Those considerations should not be compromised or placed at risk. On the other hand, great care should be taken not to overreact and unduly sever the career of an employee of long-standing and good service when the evidence establishes, on the balance of probabilities, that there is not real jeopardy to the Company's legitimate interests.
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> > A review of the cases cited above discloses that arbitrators require that an employee seeking the benefit of a tribunal's discretion to order their reinstatement into employment

should, at a minimum, be forthcoming with a clear account of the circumstances leading to their incarceration, their prior criminal record, if any, as well as any evidence which might be persuasive with respect to their rehabilitation. It is also noteworthy that in some cases long service has been considered an important element in the balancing of equities, as for example, in **CROA 1645** and **CROA 1934** where both grievors had twenty-one years' good service with the employer.

A careful review of the record in this case gives the Arbitrator pause. Firstly, at the date of the arbitration hearing the grievor was still incarcerated, although it appears that he will shortly be released from custody, having served his full sentence, in late March of 1996. There are, in the circumstances, a number of substantial questions which remain unanswered, and related concerns which are therefore unresolved. Firstly, during the course of the initial disciplinary investigation held by the Company on October 12, 1994, when the grievor was first placed in custody, when asked whether he had any rebuttal to the six charges laid against him Mr. Davison responded "I have no idea what the charges are about". During the same investigation he revealed that he had previously been charged with sexual assault, some ten years previous, although those charges were apparently dropped. He further disclosed that in June of 1994 he was made the subject of a Court order which included a direction that he not have any personal contact with his wife or family for a period of one year and that he not possess any firearms or explosives. In respect of that directive he stated, during the course of the Company's investigative interview, "I have no idea why the Court Order was issued in the first place."

Concern also flows from the fact that Mr. Davison did not achieve parole within the time frame normally expected. During the course of the final investigative interview taken by the Company at the Regina Correctional Institute on May 24, 1995, when asked when he expected to be released, and possibly available for Company service, Mr. Davison replied as follows:

11 Q. What length of sentence did you receive as a result of this charge and what other conditions apply, if any?

11 A. I was sentenced to 18 months. As soon as my incarceration started, my sentence was reduced to 12 months.

12 Q. Does this mean you will be released in March 1996?

12 A. I expect to remain here at the Regina Correctional Centre until some time in July. At that time, I am scheduled to be transferred to a C.T.R. (a correctional training and rehabilitation facility) at North Battleford, where I will be enrolled in an Aggression Management Course. This facility is like a half way house where I will be free to come and go on my own initiative as long as I attend the course each night. **This is supposed to last about 8 weeks, after which I will be released on parole (sometime in September 1995). I will remain on parole until my sentence expires on March 30, 1996.**

13 Q. In effect this means that you would be able to return to work in September if this schedule doesn't change?

13 A. Yes.

(emphasis added)

In fact, events did not unfold as the grievor hoped. For reasons which are not explained to the Arbitrator, Mr. Davison was not parolled in September of 1995 and, as indicated above, still remains in custody, apparently serving his full sentence in close custody.

As the Union stresses, Mr. Davison has fifteen years' service with the Company, and no discipline on his record prior to the incidents giving rise to his detention, commencing in September of 1995. Also, it is a fact that the charges against him are not, on their face, job-related. While the Arbitrator is prepared to give the foregoing factors the

mitigating value which they deserve, there are nevertheless aggravating factors which still weigh heavily in the balance. The record discloses that the grievor was the subject of a Court order prohibiting contact with his immediate family, and also prohibiting his possession of firearms or explosives, apparently issued in June of 1994. When asked to explain or elaborate upon that order, however, he states that he has "no idea" why it was issued by the Court. Similarly, as a first indication to the Company, he stated that he had "no idea what the charges are about" at the time he was first arrested in September of 1994. Of additional concern are the terms of the restraining order appended to his conditions of release on November 4, 1994. That document, issued by Justice R.A. McLean at Moose Jaw, directs that the grievor have no contact, direct or indirect, with some eleven named persons, and also that he abstain from the use or possession of alcohol and non-prescription drugs.

Very simply, the case presented on behalf of the grievor is far from complete or reassuring. He remains in custody, apparently without parole, prior to the serving of his full sentence. He has been the subject of two restraining orders by the Courts which, on their face, evince a genuine concern about the grievor's propensity for violence or threats of violence to persons close to himself. His own comments in respect of those orders, and the charges against him, appear less than candid, and do not convey either remorse or a determination towards personal rehabilitation. In the circumstances, I am compelled to the unfortunate conclusion that the grievor has not been candid, that the record raises more questions than answers and that the Company can have legitimate concern for the safety and integrity of its own employees, in light of the apparent dysfunction and violence exhibited in the grievor's prior behaviour in dealing with persons close to himself, necessitating restraining orders on two separate occasions. On the whole of the evidence, the instant case does not disclose compelling grounds for the exercise of the Arbitrator's discretion to substitute a lesser penalty for the sanction of discharge which was imposed.

For all of the foregoing reasons the grievance must be dismissed.

March 15, 1996

(signed) MICHEL G. PICHER
ARBITRATOR